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WANG BAO' AN & ORS v. MALAYSIAN AIRLINE SYSTEM BHD & OTHER CASES

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[CIVIL SUIT NO: 21NCVC-25-03-2017; 21NCVC-43-04-2016
B (FORMERLY REGISTERED AS WA-22NCVC-146-03-2016); 21NCVC-26-03-2017; 21NCVC-20-03-2016; 21NCVC-15-02-2016; 21NCVC-51-08-2015; 21NCVC-22-03-2016; 21NCVC-23-03-2016; 21NCVC-33-03-2016; 21NCVC-34-03-2016; 21NCVC-27-03-2016; 21NCVC-28-03-2016; 21NCVC-30-03-2016]
C 21 MAY 2018

AVIATION LAW: *Fatal accidents – Liability of carrier – Loss of aircraft out of international carriage by air of passengers – Whether Montreal Convention and Warsaw Convention provide exclusive causes of action against carrier – Whether all*
D *common law causes of action ousted – Whether cap on liability for dependency claim imposed by s. 7 of Civil Law Act 1956 applies in respect of claim under Montreal Convention*

CIVIL LAW ACT: *Dependency claim – Claim for damages – Disappearance of aircraft out of international carriage by air of passengers – Whether cap on liability*
E *for dependency claim imposed by s. 7 of Civil Law Act 1956 ('CLA') applies in respect of claim under Montreal Convention – Whether s. 5 of Carriage by Air Act 1974 displaces whole of s. 7 of CLA – Whether merely substitutes causes of action – Whether s. 7(3) of CLA governs recoverability and assessment of damages consequent upon any liability found under art. 17 of Montreal Convention*

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CIVIL PROCEDURE: *Disposal on point of law – Issues – Whether Montreal Convention and Warsaw Convention provide exclusive causes of action against carrier and all common law causes of action ousted – Whether cap on liability for dependency claim imposed by s. 7 of Civil Law Act 1956 applies in respect of claim under Montreal Convention – Whether whole action would be disposed of by*
G *determination of question of law – Whether suffices if questions determine 'any claim or issue' in action – Rules of Court 2012, O. 14A*

INTERNATIONAL LAW: *Conventions – Binding effect within Malaysia – Loss of aircraft out of international carriage by air of passengers – Whether jurisdiction of either Warsaw Convention or Montreal Convention invoked – Whether*
H *pre-condition to art. 17(1) of Montreal Convention applies – Whether Montreal Convention and Warsaw Convention provide exclusive causes of action against carrier and all common law causes of action ousted – Whether cap on liability for dependency claim imposed by s. 7 of Civil Law Act 1956 applies in respect of claim under Montreal Convention*

I

The O. 14A of the Rules of Court 2012 ('ROC') application herein arose out of the disappearance of flight MH370, on 8 March 2014, which was operated by Malaysian Airline System Berhad ('MAS'). The two broad questions of

law for the court's determination were: (i) whether the Convention for the Unification of Certain Rules for International Carriage by Air 1999 ('the Montreal Convention') and the Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 ('the Warsaw Convention') provide exclusive causes of action against a carrier and, as a consequence, oust all common law causes of action; and (ii) whether the cap on liability for a dependency claim imposed by s. 7 of the Civil Law Act 1956 ('CLA') applies in respect of a claim made under the Montreal Convention. In its formal applications under O. 14A, MAS framed the following questions in connection with the scope of the Montreal Convention: (a) whether art. 17(1) of the Montreal Convention provides an exclusive cause of action to claimants against the carrier in connection with an accident resulting in the loss of life of the passengers on board an aircraft in the course of international carriage by air as defined by that Convention; and (b) if (a) was answered in the affirmative, whether art. 29 of the Montreal Convention precludes/pre-empts the availability of all common law causes of action against the carrier in respect of the loss of life of those passengers. Similar questions were posed in respect of Suit WA-21NCVC-33-03/2016 relating to the scope of Warsaw Convention. On the scope and applicability of s. 7 of the CLA, the questions framed were (a) whether s. 5 of the Carriage by Air Act 1974 read together with the Third Schedule thereof operates to exclusively regulate the liability regime and/or the cause of action in relation to fatal aviation accidents in relation to the death of a passenger under art. 17 of the Montreal Convention; and (b) whether recoverable damages as a result of any liability found under art. 17 of the Montreal Convention would be governed by s. 7 of the CLA being the operative domestic law in Malaysia regulating recoverable damages and assessment thereof for fatal accident. Some of the plaintiffs raised preliminary objection that the pre-conditions to art. 17(1) of the Montreal Convention, that the accident which caused the loss of life took place on board the aircraft or in the course of any of the operations of embarking or disembarking, must be shown to apply and that the applicability of art. 17(1) could only be determined at a trial.

Held (answering questions posed in the affirmative):

(1) Based on a literal construction of the plain words of O. 14A of the ROC, it is not necessary for the court to form the view that the whole of the action would be disposed of by the determination of the questions of law. In light of the provision of O. 14A r. 1(1)(b), if the court is of the view that the question of law is suitable for determination without a full trial of the action, the court may make a determination pursuant to O. 14A even if it does not dispose of the entire action. It suffices that the questions would determine 'any claim or issue' in the action. The marginal note in any legislation, even though may be referred to, is merely an aid to construction and cannot override the plain meaning of the operative provisions. (paras 15, 17 & 18)

(2) Each of the Warsaw and Montreal Conventions provide for exclusive causes of action in international air transportation, where the claims arise out of international carriage of passengers, baggage or cargo by air. Where the Conventions apply, no cause of action can exist against the carrier except as provided within the confines of the Conventions themselves. The objection herein was that the preconditions of art. 17 of either Convention had yet to be shown to have been fulfilled. However, that issue would only determine the liability of the carrier, and not the applicability of the Convention. (para 21)

(3) The pleadings on all the cases herein were premised upon the fact that the loss of the aircraft arose out of the international carriage by air of the passengers. Whatever the cause of the accident may be, must all necessarily have arisen from the fact of the passengers having boarded an international flight, the places of departure and arrival of which were located in two different contracting States of either Warsaw Convention or the Montreal Convention. This would mean that the jurisdiction of the Conventions would have been invoked. The statements of claim pleaded the applicability of the Montreal Convention, and hence, it would not be open to the plaintiffs to put forth the argument that it must first be established, as a matter of fact, that the pre-conditions to art. 17(1) of the Convention applied. Thus, the preliminary objections were dismissed. (para 21)

(4) Article 17(1) of the Montreal Convention provides an exclusive cause of action to an accident falling within the ambit of the Montreal Convention, whilst art. 29 ousts all common law causes of action against the carrier. The similar principles apply in connection with the Warsaw Convention. Thus, the questions posed in Suit WA-21NCVC-33-03-2016 were answered in the affirmative. (paras 22 & 23)

(5) On the other hand, European Parliament and Council Regulation (EC) 261/2004 provides, among others, for fixed compensation to passengers where their flights are cancelled without prior notification or where notification was less than seven days prior to scheduled departure, and where they are not offered a rerouted flight departing not more than an hour after the scheduled departure and arriving less than 2 hours after the scheduled time of arrival. The particular nature of the standardised compensation payable under the Regulation 261/2004 meant that it was not subject to the ouster clause of art. 29 of the Montreal Convention. However, in the present cases, none of the claims for damages could be argued to be akin to the compensation payable under Regulation 261/2004. The plaintiffs were in fact seeking redress on an individual basis, and in some cases, purporting to do so outside the limits set out in the Warsaw and Montreal Conventions. (paras 63 & 65)

(6) Pertaining to the second question, s. 5 of the Carriage by Air Act 1974 does not displace the whole of s. 7 of the Civil Law Act 1956, but merely operates to substitute the applicable causes of action. Thus, the liability for any 'wrongful act, neglect or default' as used in s. 7(1) of the CLA would be taken as having been substituted with the no fault liability of a carrier introduced by art. 17(1) in cases of fatal international aviation accidents. If the whole of s. 7 is excluded by the operation of s. 5 of the Carriage by Air Act 1974, it would follow that there would not exist any ability to claim for the death of a person, and hence, no means by which damages may be calculated, for damages are not even claimable at common law. (paras 82 & 85)

(7) Section 7(2), which provides for the identity of potential claimants in a dependency claim, is modified or substituted by provisions of para. 1 of the Third Schedule to the Carriage by Air Act 1974, which extends the categories of potential claimants. This interpretation was justifiable based on the principle of construction that the more specific provisions of law dealing with international aviation accidents would prevail over the position at general law relating to dependency claims. As none of the Carriage by Air Act 1974, the Third Schedule or the Montreal Convention makes express mention of any applicable measure of damages, s. 7(3) would apply to determine what the rights of a plaintiff may be in a claim in Malaysia under the Montreal Convention. (para 86)

Case(s) referred to:

All Nippon Airways Co Ltd v. Tokai Marine & Trading Co Ltd [2012] 9 CLJ 429 CA ***(refd)***

Cuadrench Moré v. Koninklijke Luchtvaart Maatschappij [2013] 2 All ER (Comm) 1152 ***(dist)***

Dawson v. Thomson Airways [2014] EWCA Civ 845 ***(dist)***

El Al Israel Airlines Ltd v. Tsui Yuan Tseng 119 S Ct 662 (1999) ***(refd)***

Frederick v. Ottawa Aero Services [1963] 42 DLR (2d) 122 ***(refd)***

Gahan v. Emirates [2017] EWCA Civ 1530 ***(dist)***

Ganesan Singaram v. Setiausaha Suruhanjaya Pasukan Polis & Ors [1997] 1 LNS 227 HC ***(refd)***

IATA v. Dept of Transport ECJ Judgment of 10.1.2006, Case C-344/04 ***(refd)***

Nelson v. Deutsche Lufthansa [2013] 1 All ER (Comm) 385 ***(refd)***

Ong Joshua v. Malaysian Airline System [2008] 3 HKC 26 ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

Sambu Pernas Construction & Anor v. Pitchakkaran Krishnan [1982] CLJ 151; [1982] CLJ (Rep) 299 FC ***(refd)***

Sidhu v. British Airways plc [1997] AC 431 ***(refd)***

Stott v. Thomas Cook [2014] UKSC 15 ***(refd)***

Sturgeon v. Condor Flugdienst [2010] All ER (EC) 660 ***(dist)***

Thibodeau v. Air Canada [2015] 4 LRC 324 ***(refd)***

Zicherman v. Korean Air Lines 516 US 217 [1996] ***(refd)***

Legislation referred to:
Carriage by Air Act 1974, s. 5, Third Schedule para 1
Civil Law Act 1956, s. 7(1), (2), (3)
Rules of Court 2012, O. 14A r. 1(1)(b), O. 33 r. 2

Carriage by Air Act [Canada], s. 2(4)

(Civil Suit No: 21NCVC-25-03-2017)
For the plaintiffs - Leong Yeen San, Aria Tan & Nicole Lee; M/s San Leong
For the defendant - Saranjit Singh & Dhiya Damia Shukri; M/s Saranjit Singh

(Civil Suit No: 21NCVC-43-04-2016 (formerly registered as WA-22NCVC-146-03-2016) & 21NCVC-26-03-2017)
For the plaintiffs - Balan Nair & Adrian Ong; M/s Thomas Philip
For the defendants - Saranjit Singh & Dhiya Damia Shukri; M/s Saranjit Singh

(Civil Suit No: 21NCVC-20-03-2016)
For the plaintiffs - Ganesan Nethi & Daniel Tan; M/s Tommy Thomas
For the defendants - Saranjit Singh & Dhiya Damia Shukri; M/s Saranjit Singh

(Civil Suit No: 21NCVC-15-02-2016)
For the plaintiffs - Brijnandan Singh Bhar & Angela Bong; M/s Brijnandan Singh Bhar & Co
For the defendants - Saranjit Singh & Dhiya Damia Shukri; M/s Saranjit Singh

(Civil Suit No: 21NCVC-51-08-2015 & 21NCVC-22-03-2016; 21NCVC-23-03-2016; 21NCVC-33-03-2016; 21NCVC-34-03-2016; 21NCVC-27-03-2016; 21NCVC-28-03-2016; 21NCVC-30-03-2016)
For the plaintiffs - Sangeet Kaur Deo, Ngeow Chow Ying & Tan Chee Kian; M/s Ngeow & Tan
For the defendants - Saranjit Singh & Dhiya Damia Shukri; M/s Saranjit Singh

Reported by S Barathi

JUDGMENT

Azizul Azmi Adnan J:

Re: The Scope of the Exclusivity Principle under the Montreal and Warsaw Conventions and the Applicability of Section 7 of the Civil Law Act 1956 to Claims under the Montreal Convention, in connection with Claims arising from the Disappearance of Flight MH370

Introduction

[1] These are grounds of judgment in respect of O. 14A applications in connection with 13 cases relating to the disappearance of flight MH370. The particulars of the cases to which this judgment applies are set out in the appendix.

[2] The court directed Malaysian Airline System Berhad, a common defendant in all cases, to file applications under O. 14A of the Rules of Court 2012 for the determination of two questions of law. In broad terms, the first question was whether the Convention for the Unification of Certain Rules for International Carriage by Air 1999 (the "Montreal Convention") and the

Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 (the "Warsaw Convention") provide exclusive causes of action against a carrier and, as a consequence, oust all common law causes of action. The second was whether the cap on liability for a dependency claim imposed by s. 7 of the Civil Law Act 1956 applies in respect of a claim made under the Montreal Convention.

[3] These cases arise out of the disappearance on 8 March 2014 of a Boeing 777 bearing the registration number 9M-MRO and flight code MH370. At the material time, MH370 was operated by Malaysian Airline System Berhad. For ease of reference, it is referred to in this judgment as "MAS".

[4] In its formal applications under O. 14A, MAS framed the following questions in connection with the scope of the Montreal Convention:

(a) Whether art. 17(1) of the Montreal Convention provides an exclusive cause of action to claimants against the carrier in connection with an accident resulting in the loss of life of the passengers on board an aircraft in the course of international carriage by air as defined by that Convention; and

(b) If (a) is answered in the affirmative, whether art. 29 of the Montreal Convention precludes/pre-empts the availability of all common law causes of action against the carrier in respect of the loss of life of those passengers.

[5] In respect of suit WA-21NCVC-33-03-2016, the applicable treaty is the Warsaw Convention. Similar questions were posed in that case relating the scope of the Warsaw Convention.

[6] The following questions were framed in connection with the scope and applicability of s. 7 of the Civil law Act 1956:

(a) Whether s. 5 of the Carriage by Air Act 1974 read together with Third Schedule thereof operates to exclusively regulate the liability regime and/or the cause of action in relation to fatal aviation accidents in relation to the death of a passenger under art. 17 of the Montreal Convention; and

(b) Whether recoverable damages as a result of any liability found under art. 17 of the Montreal Convention would be governed by s. 7 of the Civil Law Act 1956 being the operative domestic law in Malaysia regulating recoverable damages and assessment thereof for fatal accidents.

[7] It was not necessary to address the Warsaw Convention here as the plaintiffs in case WA-21NCVC-33-03-2016 do not dispute the applicability of s. 7(3) of the Civil Law Act 1956.

[8] Mr Ganesan Nethi, counsel for the plaintiffs in case WA-21NCVC-20-03-2016, and Ms Sangeet Kaur Deo, counsel for the plaintiffs in eight other cases, raised preliminary objections in connection with the O. 14A applications. I deal first with those objections.

The Preliminary Objections

The Reasons For The Order 14A Applications

[9] In directing that MAS filed formal applications under O. 14A of the Rules of Court 2012, the court was of the view that the determination of these questions would dispose of a part of the plaintiffs' claims against MAS. For example, some of the plaintiffs had pleaded the common law cause of action of negligence against MAS. If the Montreal Convention indeed ousts common law causes of action, then the action for negligence against MAS would not be maintainable.

[10] I was also of the view that the determination of these questions would also have an impact on the manner in which trial would be conducted. Under the Montreal Convention, the liability of a carrier up to the amount of 113,100 SDRs[1] for the death of a passenger was strict, provided that it is shown that the accident which caused the death took place on board the aircraft or in the course of any of the operations of embarking or disembarking. For damages in excess of such amount, it will be open to the carrier to dispute liability on the basis that the damage was not due to its negligence or other wrongful act or omission or that the damage was solely due to the negligence or other wrongful act or omission of a third party. The carrier will however bear the burden of proving its lack of culpability.

[11] In all these cases, I propose to put MAS to elect, prior to trial, whether it wishes to dispute its liability pursuant to art. 21(1) of the Montreal Convention. The reason why MAS has not yet been asked to make the election was simply because there may yet be further information that may be forthcoming as a result of the on-going investigations into the disappearance of MH370.

[12] It can be seen that, if the Montreal Convention does indeed oust all common law causes of action against the carrier:

(a) if MAS elects to dispute liability under art. 21(2), then MAS would be directed commence its case first, as it bears the burden of proving its lack of culpability;

(b) if MAS does not so elect, then trial would be limited to the question of damages, as liability was strict.

[13] Because the manner in which trial was to be conducted would be affected by these questions of law, I considered it appropriate that these preliminary questions of law be determined first.

[14] The third reason why I was of the view that it was desirable to address these questions at a preliminary hearing was for the efficient and effective utilisation of judicial resources. These questions affected all 13 cases before me. I considered that it would be convenient for a single judgment be delivered on these common issues, and for all appeals (if any) against this judgment be heard together, rather than for there to be a proliferation of judgments on the same issues after trial on the merits of each case.

Whether An Application Under O. 14A Needs To Dispose Of The Entire Case

[15] I am of the view that, based on a literal construction of the plain words of O. 14A itself (and despite its marginal note), it is not necessary for the court to form the view that the whole of the action would be disposed by the determination of the question of law.

[16] Order 14A is titled as "disposal of case on point of law". Rule 1(1) provides as follows:

> (1) The Court may, upon the application of a party or of its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:
>
> (a) such question is suitable for determination without the full trial of the action; and
>
> (b) such determination will finally determine the entire cause or matter or any claim or issue therein.

[17] Order 14 r. 1(1)(b) provides that the determination of the question of law "will finally determine the entire cause or matter or any claim or issue therein". The word "entire" in this sub-paragraph qualifies the words "cause or matter", but does not qualify the words "claim or issue". Instead, the word that qualifies "claim or issue" is the word "any". It follows therefore that, if the court is of the view that the question of law is suitable for determination without a full trial of the action, the court may make a determination pursuant to O. 14A even if it does not dispose of the entire action. It suffices that the question will determine "any claim or issue" in the action.

[18] Even though the modern approach to statutory construction permits reference to be made to marginal notes in any legislation (see for example *Ganesan v. Setiausaha Suruhanjaya Pasukan Polis*[2]), the marginal note is a merely an aid to construction and cannot, in my view, override the plain meaning of the operative provisions.

[19] This construction is supported by the decision of the Court of Appeal in *Petroleum Nasional v. Kerajaan Negeri Terengganu*[3]. In considering the distinction between O. 14A and O. 33 r. 2, Mohd Noor Ahmad JCA stated:

> With regard to this ground of the learned judge, with due respect we do not agree with it. Clearly, it demonstrates the lack of appreciation of the scope and efficacy of O. 14A and O. 33 r. 2 and the distinction between

them. **Under the former, the entire cause or matter need not be finally determined**. It also permits any claim or issue herein to be so determined, but the question must be purely question of law or construction of document. And the latter caters not only for the question or issue of law arising in a cause or matter to be tried but also of fact or partly of fact and partly of law, and also the entire cause or matter need not be finally determined. In spite of the similarities between the two orders, there are also differences between them otherwise the former would not have been introduced into our civil procedure. It is to be stressed that under both orders the court can direct the question or issue to be determined or tried without the need for any party having to apply for it and the court may on its own frame or reframe the question or issue for the purpose or recast the question or issue proposed by the applicant or subtract therefrom or add thereto other question or issue. These can be gathered from the provisions of the orders itself. It is manifestly evident that the court has a wide discretion on the matter. What more in this case, where the applications are pitched under both orders, the playing field within which for the learned judge to exercise his discretion is even wider.

(emphasis added)

The Preliminary Objection Raised

[20] It was advanced for some of the plaintiffs that the preconditions to art. 17(1) of the Montreal Convention must be shown to apply before a claimant has a right of action under the Montreal Convention. These preconditions are that the accident which caused the loss of life took place on board the aircraft or in the course of any of the operations of embarking or disembarking. Even though death has been presumed in all of these cases, the argument was made that whether or not the conditions for the applicability of art. 17(1) have been met can only be determined at a trial. For this reason - it was argued - it would not be appropriate for the preliminary questions of law be determined at this stage in proceedings.

[21] On 17 April 2018, I dismissed the preliminary objections raised by the plaintiffs represented by Mr Nethi and Ms Sangeet. The reasons for my decision are as follows:

(a) the first reason was that each of the Warsaw and Montreal Conventions provides for exclusive causes of action in international air transportation, where the claims arise out of international carriage of passengers, baggage or cargo by air. Where the Conventions apply, no cause of action can exist against the carrier except as provided within the confines of the Conventions themselves. In this regard, a distinction is drawn within the applicability of the Conventions on the one hand, and the circumstances under which liability may arise on the other. The Conventions apply when the claims arise out of the international carriage by air of passengers (per Lord Hope in *Sidhu v. British Airways plc*[4], discussed at paras. 27 *et seq.*, *post*) or where the accident happened within the temporal scope of the Conventions (per Lord Toulson SCJ in

Stott v. Thomas Cook[5]). Thus in a number of cases, one or other of the Conventions was held to apply to the facts of the case, yet no liability arose because the preconditions in art. 17 of the relevant Conventions were held not to have been fulfilled, either because there was no bodily injury or because the accident happened outside the period between embarkation and disembarkation.

In other words, it does not matter that the preconditions in art. 17 of either Convention have yet to be established as having been fulfilled. Neither of Mr Nethi nor Ms Sangeet sought to argue that the loss of the aircraft occurred outside the temporal or spatial scope of the Montreal Convention or Warsaw Convention (as applicable). Rather, the objection was that the preconditions of art. 17 of either Convention have yet to be shown to have been fulfilled. That issue, in my opinion, determines the liability of the carrier, and not the applicability of either Convention.

Furthermore, the pleadings on all the cases before me are premised upon the fact that the loss of the aircraft arose out of the international carriage by air of the passengers. Indeed I would make the further observation that the loss of lives of the passengers (whose deaths are presumed and accepted by all parties) must necessarily have arisen out of their international carriage on the aircraft operated by MAS. It is not in dispute that the passengers boarded the aircraft. Whatever the cause of the accident may be, all the possibilities – whether instrumentation failure, pilot error or even a premeditated act against the aircraft – must all necessarily have arisen from the fact of the passengers having boarded an international flight, the places of departure and arrival of which are located in two different contracting States of either the Warsaw Convention or the Montreal Convention. This would mean that the jurisdiction of the Conventions would have been invoked.

The analysis of the scope of the exclusivity principle mentioned in the preceding paragraphs are addressed in detail in paras. 22 to 67, *post*; and

(b) in any event, the statements of claim in the relevant cases have pleaded the applicability of the Montreal Convention, and hence it will not be open to the plaintiffs to put forth the argument that it must first be established as a matter of fact that the preconditions to art. 17(1) of the Convention apply. The plaintiffs are bound by their own pleadings.

Does The Montreal Convention Provide An Exclusive Cause Of Action?

[22] In relation to the questions to be determined pursuant to the O. 14A application, I am of the view that:

(a) Article 17(1) of the Montreal Convention does provide an exclusive cause of action to an accident falling within the ambit of the Montreal Convention;

(b) Article 29 of the Montreal Convention also ousts all common law causes of action against the carrier.

[23] I am of the view that similar principles apply in connection with the Warsaw Convention, and that accordingly, the answers to the questions posed in suit WA-21NCVC-33-03-2016 are also in the affirmative.

[24] A carrier's liability falls within the jurisdiction of the Montreal Convention when the relevant contract of carriage is an international contract of carriage. As alluded to at para. 10 above, a claimant must also show that the incident that is complained of fulfils the conditions set out in arts. 17 to 19 of the Montreal Convention.

[25] Once these preconditions are met, the liability of the carrier is established. However, the jurisdiction of the Convention arises not upon fulfilment of the preconditions. Its jurisdiction arises because of the existence of the contract of international carriage by air. By art. 29 of the Montreal Convention, its jurisdiction is exclusive and precludes the existence of any other cause of action arising or being maintained against a carrier. The scope and effect of art. 29 as well as that of its predecessor provision in art. 24(2) of the Warsaw Convention have been considered in the apex courts of many jurisdictions, who have consistently upheld the position that the Conventions provide for exclusive causes of action against a carrier and ousts all other causes of action. It was advanced for some of the plaintiffs that there exists a recent trend to depart from the exclusivity principle. Having considered these latter lines of cases, I am of the view that they provide only a limited exception to the general rule of exclusivity, in circumstances where there exists European Community law providing for rights to standardised compensation.

[26] What follows is a selection of cases illustrating the applicable principles. The court records its gratitude to counsel for drawing its attention to the cases cited in argument. It is not possible (nor desirable) for me include a comprehensive summation of all the cases discussed in submissions but I have included those that I considered significant and relevant to the undisputed facts of the present case.

The Case Law

[27] In *Sidhu v. British Airways plc*[6], passengers on board a flight from London to Kuala Lumpur were detained by Iraqi forces while the flight was in transit in Kuwait. The aircraft had landed in Kuwait just a few short hours after the Iraqi invasion of Kuwait in August 1990. One of the claimants, a Mrs Abnett, had been detained by the Iraqi forces for over a month, while the Sidhus for over two weeks. Mrs Abnett claimed damages for psychological injuries that she had suffered due to the stress arising from her captivity, on grounds that the carrier had breached an implied term of the contract of carriage by failing to take reasonable care for the safety of its

passengers in landing the aircraft in a war zone when it knew or ought to have known that the passengers would be exposed to risk due to the invasion. The Sidhus, on the other hand, based their action in negligence but on the same premise, that the carrier knew or ought to have known of the impending hostilities and the consequences of landing in a war zone. None of the claimants based their action on the Warsaw Convention.

[28] It will be useful at this point to refer to art. 17 of the Warsaw Convention. Article 17 provides:

> Article 17
>
> The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[29] It was common ground between the parties in this case that art. 17 of the Warsaw Convention did not apply to the facts of the case. This was because, on the facts, the incident causing the damage sustained by the claimants did not take place on board the aircraft or in the course of the operations of embarking or disembarking. The passengers had been disembarked into the transit lounge while the aircraft was being refuelled. It was while they were in the terminal that the airport was attacked by Iraqi aircraft and taken over by Iraqi soldiers.

[30] The House of Lords held that the claimants were precluded by art. 24(2) of the Warsaw Convention from having recourse to the common law. The Warsaw Convention was comprehensive in respect of the issues covered and if the Convention did not provide a remedy, then no remedy was available whether at common law or otherwise. In other words, the Warsaw Convention provided for the only circumstances in which a carrier would be liable in damages for claims arising out the international carriage by air of a passenger.

[31] This conclusion was arrived at by the court after having considered the interrelationship between arts. 23 and 24 of the Convention. These are reproduced below for reference.

> Article 23
>
> (1) Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.
>
> (2) Paragraph (1) of this article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

A Article 24

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

B (2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.[7]

[32] In delivering his judgment, Lord Hope had stated as follows:

C The structure of these two provisions seems to me, therefore, to be this. On the one hand, the carrier surrenders his freedom to exclude or to limit his liability. On the other hand, the passenger or other party to the contract is restricted in the claims which he can bring in an action for damages by the conditions and limits set out in the Convention. The idea that an action for damages may be brought by a passenger against the D carrier outside the Convention in the cases covered by art 17, which is the issue in the present case, seems to be entirely contrary to the system which these two articles were designed to create.

The reference in the opening words of art 24(2) to 'the cases covered by Article 17' does, of course, invite the question whether art 17 was E intended to cover only those cases for which the carrier is liable in damages under that article. The answer to that question may indeed be said to lie at the heart of this case. In my opinion, the answer to it is to be found not by an exact analysis of the particular words used but by a consideration of the whole purpose of the article. In its context, the purpose seems to me to be to prescribe the circumstances, that is to say F the only circumstances, in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air.

The phrase 'the cases covered by Article 17' extends therefore to all claims made by the passenger against the carrier arising out of international carriage by air, other than claims for damage to his registered baggage which must be dealt with under art 18 and claims for delay which must G be dealt with under art. 19. The words 'however founded' which appear in art. 24(1), and are applied to passenger's claims by art. 24(2), support this approach. The intention seems to be to provide a secure regime, within which the restriction on the carrier's freedom of contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the H Convention are to apply. To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier. Thus, the purpose is to ensure that, in all questions relating to the I carrier's liability, it is the provisions of the Convention which apply and

that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention.

[33] There are two important practical consequences of this decision:

(a) The first is that all common law causes of action are precluded if art. 17 of the Warsaw Convention applies. This is unsurprising, given the clear words of the Convention. Indeed, this was a common position adopted by the parties in *Sidhu*[8]; and

(b) Secondly, even if art. 17 does not apply – for example, because the injuries sustained were not the result of an accident occurring on board the aircraft – then equally the common law causes of action are precluded by reason of the scope of art. 24(2) in accordance with the true construction of the Warsaw Convention. This is provided that the claim arises out of the international carriage by air of the passenger in question.

[34] In *Ong Joshua v. Malaysian Airline System*[9], the Hong Kong Court of Appeal was faced with a similar set of circumstances as that before the House of Lords in *Sidhu*. Joshua Ong, the plaintiff in this unfortunate case, was travelling from Kuala Lumpur to Hong Kong on the defendant carrier as an unaccompanied minor. Upon arrival, he was greeted by a Ms Evon, an agent of the airline, who accompanied him towards the customs and immigration counters. Ms Evon noticed that the plaintiff, who was 13 at the material time, looked pale, and was told that he had a headache. Ms Evon told the plaintiff to queue at the immigration line. She then left him and walked towards the immigration channel reserved for cabin crew. As the plaintiff was about to walk up to the immigration counter, he fainted and hit his head on the marble floor, suffering a fractured skull, contusion to his right frontal lobe and a subdural haematoma. He underwent an operation but was left with attentive and learning deficiencies.

[35] The plaintiff, through his mother, sued the airline, claiming that it had breached an implied term of the contract of carriage by failing to escort him through customs and immigration clearance and baggage reclaim. The action was however only commenced two years and nine days after the incident, which was after expiry of the limitation period provided for under the Warsaw Convention. The questions before the court were whether the Warsaw Convention applied to the circumstances of the case and whether the plaintiff could sustain a claim in contract for breach of implied terms.

[36] The court found that the Warsaw Convention applied to the circumstances of the case because the claim arose out of a contract of international carriage by air. Nonetheless, based on the facts of this particular case, the process of disembarkation had completed by the time the plaintiff

suffered his injuries. Therefore no liability of the airline arose under art. 17. The court was also of the view that the scope of the airline's contract of carriage was not or not necessarily co-extensive with its Convention liability under art. 17. Thus, while the contractual terms may have extended to ensuring that the plaintiff cleared all the control points in the airport (due to the fact that the plaintiff was travelling as an unaccompanied minor), no liability arose even if those contractual terms were breached. This was because the only remedies available to the plaintiff in relation to the contract of international carriage were those under the Warsaw Convention.

[37] Put another way, even though the carrier may have agreed – *albeit* impliedly – to be contractually liable to the passenger, no liability attaches because the Warsaw Convention ousts all common law and other causes of action against the carrier arising out of the international carriage by air of the passenger by the carrier.

[38] In the United States, the Supreme Court in the case of *El Al Israel Airlines Ltd v. Tsui Yuan Tseng*[10] applied the *ratio* of the House of Lords in *Sidhu*, and confirmed the exclusivity of the Warsaw Convention. In this case, Tseng was identified as a high-risk passenger due to her answers to questions posed to her during pre-boarding procedures for a flight from JFK Airport bound for Tel Aviv. She was then subjected to a comprehensive body search, which left her emotionally traumatised and disturbed. She claimed for assault and false imprisonment against the airline, but made no claim for bodily injuries.

[39] Ginsburg J delivered the 8:1 majority opinion of the court, and held as follows:

> We hold that recovery for a personal injury suffered "on board [an] aircraft or in the course of any of the operations of embarking or disembarking", if not allowed under the Convention, is not available at all.

[40] In this case, it was not in dispute that the incident complained of occurred in the course of embarking. The claim was nonetheless dismissed for the reason that art. 17 only permitted claims for death, wounding or any other bodily injury.

[41] The decision in *Tseng* is notable for the following passage in the majority judgment, which did not form the *ratio* of the case:

> The Second Circuit feared that if Article 17 were read to exclude relief outside the Convention for Tseng, then a passenger injured by a malfunctioning escalator in the airline's terminal would have no recourse against the airline, even if the airline recklessly disregarded its duty to keep the escalator in proper repair. See 122 F. 3d, at 107. As the United States pointed out in its *amicus curiae* submission, however, the Convention addresses and concerns, only and exclusively, the airline's liability for passenger injuries occurring "on board the aircraft or in the

course of any of the operations of embarking or disembarking." Art. 17,49 Stat. 3018; see Brief for the United States as *Amicus Curiae* 16. "[T]he Convention's preemptive effect on local law extends no further than the Convention's own substantive scope." *Ibid*. A carrier, therefore, "is indisputably subject to liability under local law for injuries arising outside of that scope: e. g., for passenger injuries occurring before 'any of the operations of embarking'" or disembarking. *Ibid*. (quoting Article 17).

[42] I am of the view that this passage does not represent a departure from the position in *Sidhu* for the following reasons:

(a) it is clear that the passages in quotation marks were not the views of the Supreme Court, but rather reproductions of the arguments raised by the Federal Government of the United States as *amicus curiae*. Accordingly, the proposition that a carrier would be subject to local law if the conditions of art. 17 were not met was not an opinion of the Supreme Court; and

(b) the concern that a passenger injured by a malfunctioning escalator in an airline's terminal being left without remedy does not arise, because such an injury will not have arisen out of the passenger's international carriage by air and hence would be outside the spatial and temporal scope of the Warsaw Convention.

[43] The decision in *Tseng* is also significant for two further reasons:

(a) firstly, the Supreme Court held that the Montreal Protocol No. 4, which amended art. 24 of the Warsaw Convention, clarified but did not change the exclusivity domain of the Convention. Following the Montreal Protocol No 4, art. 24 now reads as follows:

Article 24

1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.

(b) secondly, the US Supreme Court was of the view that, in circumstances where the courts of other jurisdictions that are parties to an international treaty have ruled on a matter relating to the construction of the treaty, the views of those other courts are to be attached with considerable weight[11].

[44] A similar view was expressed by the apex court in Canada in *Thibodeau v. Air Canada*[12]. The Canadian Supreme Court held that, where the objective of a treaty is to achieve international conformity, close attention should be given to international jurisprudence, and the Canadian courts should be especially reluctant to depart from any strong international consensus that has developed in relation to the interpretation of such treaty. I am of the view that the same principle should apply in the case of Malaysia.

[45] Unlike the cases previously discussed, *Thibodeau* was concerned with the Montreal Convention, and not the Warsaw Convention.

[46] The Thibodeaus were francophone Canadian citizens who were subjected to services and announcements in English only on-board Air Canada's international flights between Toronto and Atlanta, and Toronto and Charlotte, North Carolina. They sued the airline for violation of their language rights and sought, among others, for punitive and exemplary damages.

[47] It would be appropriate at this point to reproduce the relevant provisions of the Montreal Convention:

> Article 17
>
> Death and Injury of Passengers – Damage to Baggage
>
> 1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
>
> …
>
> Article 29 – Basis of Claims
>
> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

[48] The Supreme Court, in a 5:2 majority decision, held that the Thibodeaus were precluded by the exclusive scope of the Montreal Convention from claiming damages for breach of their statutory and constitutionally protected language rights, even though the airline accepted that it had failed to provide the services in French as required by Canadian law.

[49] In construing art. 29 of the Montreal Convention (which is the successor provision to art. 24 of the Warsaw Convention), the Supreme Court had this to say:

> [37] The Montreal Convention makes clear that it provides the exclusive recourse against airlines for various types of claims arising in the course of international carriage by air. It provides that all "action[s] for damages" in the carriage of passengers, baggage and cargo are subject to the conditions and limitations of liability set out in its provisions. The provision could hardly be expressed more broadly; it applies to "any action for damages, however founded". This breadth is equally reflected in the French text: "*toute action en dommages-intérêts, à quelque titre que ce soit.*"
>
> [38] This exclusivity principle is expressed even more clearly in the Montreal Convention than it was in the Warsaw Convention. Article 24 of the Warsaw Convention introduces its exclusion of other claims by referring to "the cases covered by" Articles 17 to 19. Article 29 of the Montreal Convention, in contrast, introduces its exclusion of other claims by using the terms "[i]n the carriage of passengers, baggage and cargo". By using this broader language, it articulates even more clearly the state signatories' intention to exclude any actions not specifically addressed in Articles 17 to 19. The comments made by the chairman of the International Conference on Air Law, held in Montréal in May 1999, on this point are enlightening:
>
> > The provisions contained in Article [29] (Basis of Claims) made it clear that *an action which was brought for damages, however founded, whether under the new Convention or in contract or tort or otherwise, could only be brought subject to the conditions and such limits of liability as were set out in the Convention*. There was indeed jurisprudence which suggested that it was exclusive. It was not possible to get around the provisions of the Convention regarding the burden of proof, etc., by bringing an action in tort or by attempting to bring an action outside the Convention …" (Our emphasis.)
>
> (See *International Civil Aviation Organization, International Conference on Air Law*, vol. I, Minutes, Doc. 9775-DC/2 (2001), at p. 137)
>
> [39] The Montreal Convention sets out in Chapter III the types of liability of carriers that are permitted and the applicable limits on compensation. It also clarifies the set of events that Article 29 purports to cover. Articles 17 to 19 establish that the carrier is liable for damage sustained: in case of an accident causing the death or bodily injury of a passenger on board the aircraft or in the course of embarking or disembarking (Article 17); in case of destruction or loss of, or of damage to, baggage while in the charge of the carrier (Article 17); in the event of the destruction or loss of, or damage to, cargo during carriage (Article 18); and for damage occasioned by delay (Article 19).

[50] The position under the Montreal Convention is thus the same as that under the Warsaw Convention.

[51] The UK Supreme Court had the occasion to consider the scope of the Montreal Convention in *Stott v. Thomas Cook*[13].

[52] Mr Stott was a quadriplegic, suffering from double incontinence. He used a catheter and relied upon his wife to manage his incontinence. The incidences giving rise to his claim against Thomas Cook Tour Operators Ltd (which was a tour operator and air carrier) are best described by the judge at first instance:

> 4. On 12 September 2008 Mr Stott booked with the defendant to fly from East Midlands Airport to Zante, departing 22 September and returning 29 September 2008. Soon after making the booking on the internet he telephoned the defendant's helpline to advise that he had booked and paid to be seated next to his wife on both flights. He called the helpline again on 19 September and was assured that he and his wife would be seated together.
>
> 5. The outward flight went reasonably according to plan but sadly the return journey did not. Mr and Mrs Stott encountered many difficulties at the airport in Zante. At check-in they were told they would not be seated together. In response to their protestations the supervisor eventually told them that their problem would be sorted out at the departure gate. When they arrived at the departure gate their expectations were unfulfilled. They were told that other passengers had already boarded and the seat allocations could not be changed.
>
> 6. When boarding the aircraft from an ambulift, matters got much worse. As he entered the aircraft, Mr Stott's wheelchair overturned and he fell to the cabin floor. Those present appeared not to know how to deal with the situation. Mr Stott felt extremely embarrassed, humiliated and angry and his wife, who had recently suffered serious ill-health herself, was also very distressed at the chaotic scenes.
>
> 7. Eventually Mr Stott was assisted into his aisle seat in the front row and his wife was seated behind him. This arrangement caused them considerable difficulties in that it was difficult for Mrs Stott to assist her husband with his catheterisation, catheter bags, food and movement during the three hour twenty minute flight.
>
> 8. The defendant's cabin crew apparently made no attempt to ease their difficulties. They made no requests of other passengers to enable Mr and Mrs Stott to sit together. From time to time during the flight she had to kneel or crouch in the aisle to attend to her husband's personal needs and inevitably she obstructed the cabin crew and other passengers as they made their way up and down the aisle. It was, therefore, a very unhappy experience for them.

[53] Mr Stott sued Thomas Cook for its failure to comply with regulations imposed on air carriers licensed in a member state of the European Union concerning the rights of disabled persons with reduced mobility.

[54] The Supreme Court found that the substance of Mr Stott's claim came within the temporal scope of the Montreal Convention and was thus barred by the operation of its exclusivity principle. The Montreal Convention thus ousted any possible claim under EU disability regulations. Importantly, the court recognised that the operative causes giving rise to the claim may well have begun prior to embarkation, but that did not change the finding that the Montreal Convention applied to the facts of the case, leaving Mr Stott without a remedy. Their Lordships recognised that the result of this case was unfair to the Stotts, but any change would require amendment to the Montreal Convention.

[55] The case of *Stott* is also important because of the distinction drawn with cases such as *Nelson v. Deutsche Lufthansa*[14] where EU laws providing for standardised remedies was held to be compatible with the Montreal Convention. This is discussed at para. 66, *post*.

[56] The principle of exclusivity of causes of action in international carriage by air has been recognised by the Malaysian courts. In the Court of Appeal decision in *All Nippon Airways v. Tokai Marine & Trading*[15] (a case dealing with the Warsaw Convention), the court in answering the question of whether the Carriage by Air Act 1974 read together with the Warsaw Convention applied to exclude common law causes of action, held:

> [12] With particular reference to the application of the governing law *vis a vis* the local law and common law causes of action, we are mindful of the decision of the House of Lords in *Sidhu and Others v. British Airways Plc* [1997] 1 All ER 193, which held, *inter alia*, that where a case falls within the terms of the (UK) Carriage by Air Act 1961, the common law causes of action are all displaced. There, the same law lord, Lord Hope of Craighead, explained that whilst it is tempting to give way to the argument that where there is a wrong there must be a remedy, the domestic courts are not free to prescribe a remedy according to the local law because this would undermine the Warsaw Convention. The enlightening headnote there reads:
>
> > Held-Having regard to the objects and structure of the convention, which was to achieve a uniform international code in those area with which it dealt, including the liability of the international carrier, which could be applied by all High Contracting Parties without reference to the rules of their own domestic law, Sch 1 provides the exclusive cause of action and sole remedy for a passenger who claimed for loss, injury and damage sustained in the course of, or arising out of, international carriage by air notwithstanding that that might leave claimants without a proper remedy. Accordingly, where the Convention did not provide a remedy, no remedy was available.
>
> [13] Substantially similar sentiments have also been expressed in:
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> (a) *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2003] 1 All ER 935 at p. 936 (QBD) per Nelson J, at Held (2);

A (b) *Western Digital Corpn v. British Airways Plc* [2001] QB 733 at pp. 748-750 (CA) per Mance LJ; and

(c) *Rolls-Royce Plc v. Heavylift-Volga-Dnepr Ltd* [2000] 1 Llyod's Rep 653 at p. 657 at para [22] (QBD) per Morison J.

B [14] The trite principle which may be gleaned from the aforesaid authorities is clear and unambiguous. It is this: In any carriage by air, the provisions of the [Carriage by Air Act 1974] read with the Warsaw Convention govern the transaction in question, to the exclusion of and without reference to the rules of the local law and common law more specifically common law causes of action. We therefore answer the above question of law in the affirmative.

C

[57] Not only is this case binding on this court, but because the action had originated at the Sessions Court, the decision in *All Nippon Airways v. Tokai Marine* would be considered to be a decision of the apex court in Malaysia.

[58] In my judgment, the exclusivity principle applies with equal force D under the Montreal Convention as a matter of Malaysian law.

[59] To summarise, the applicable principles are as follows:

(a) each of the Warsaw and Montreal Conventions provides for exclusive causes of action in international air transportation, where the claims E arise out of international carriage of passengers, baggage or cargo by air;

(b) where a passenger dies or suffers bodily injuries, the carrier will be liable without proof of fault under art. 17 of the Warsaw Convention or of the Montreal Convention (as applicable) if the plaintiff can prove that the accident which caused the death or injury took place on board the F aircraft or in the course of any of the operations of embarking or disembarking; and

(c) where art. 17 of either Convention does not apply, either because there were no bodily injuries (*Tseng*, *Stott* and *Thibodeau*) or because the accident occurred outside the time between embarkation and G disembarkation (*Ong Joshua* and *Sidhu*), then no claim exists against the carrier, whether at common law or otherwise.

[60] The starkness of the law is apparent. Plaintiffs who may have genuine grouses will be left without remedy. This however is a consequence of the need to strike the balance between protecting the carriers against catastrophic H liability by limiting the circumstances under which a claim may be made, and accommodating the interests of passengers by establishing a presumption of liability. Any modifications to this position must necessarily be effected by way of amendments to the applicable treaties, as recognised by the UK Supreme Court in *Stott*.

I

The Argument For Non-exclusivity

[61] I now turn to the cases cited by counsel for the plaintiffs in some of the cases before me that, in the view of counsel, have made headway into the principle of exclusivity. This court was urged to follow and extend the principles in these cases to the facts of the present cases.

[62] Here again I do not propose to comprehensively address all the cases cited in argument, for the principles are well illustrated by examining just one of them.

[63] European Parliament and Council Regulation (EC) 261/2004 provides (among others) for fixed compensation to passengers where their flights are cancelled without prior notification or where notification was less than seven days prior to scheduled departure, and where they are not offered a rerouted flight departing not more than an hour after the scheduled departure and arriving less than two hours after the scheduled time of arrival. In the case of *Nelson v. Deutsche Lufthansa*[16], the Court of Justice of the European Union considered the question of the interrelationship between the right to compensation under Regulation 261/2004 and art. 29 of the Montreal Convention, which it will be remembered limits causes of action to those set out in the Convention.

[64] The ECJ held:

> 50 Article 19 of the Montreal Convention implies, in particular, that the damage arises as a result of a delay, that there is a causal link between the delay and the damage and that the damage is individual to passengers depending on the various losses sustained by them.
>
> 51 First of all, a loss of time is not damage arising as a result of a delay, but is an inconvenience, like other inconveniences inherent in cases of denied boarding, flight cancellation and long delay and encountered in them, such as lack of comfort or the fact of being temporarily denied means of communication normally available.
>
> 52 Next, a loss of time is suffered identically by all passengers whose flights are delayed and, consequently, it is possible to redress that loss by means of a standardised measure, without having to carry out any assessment of the individual situation of each passenger concerned. Consequently, such a measure may be applied immediately.
>
> 53 Lastly, there is not necessarily a causal link between, on the one hand, the actual delay and, on the other, the loss of time considered relevant for the purpose of giving rise to a right to compensation under Regulation No 261/2004 or calculating the amount of that compensation.
>
> 54 The specific obligation to pay compensation, imposed by Regulation No 261/2004, does not arise from each actual delay, but only from a delay which entails a loss of time equal to or in excess of three hours in relation

A to the time of arrival originally scheduled. In addition, whereas the extent of the delay is normally a factor increasing the likelihood of greater damage, the fixed compensation awarded under that regulation remains unchanged in that regard, since the duration of the actual delay in excess of three hours is not taken into account in calculating the amount of compensation payable under Article 7 of Regulation No 261/2004.

B

55 In those circumstances, the loss of time inherent in a flight delay, which constitutes an inconvenience within the meaning of Regulation No 261/2004 and cannot be categorised as 'damage occasioned by delay' within the meaning of Article 19 of the Montreal Convention, cannot come within the scope of Article 29 of that Convention.

C

56 Consequently, the obligation under Regulation No 261/2004 intended to compensate passengers whose flights are subject to a long delay is compatible with Article 29 of the Montreal Convention.

[65] It will be clear from the passage quoted above that the ECJ was of the view that the particular nature of the standardised compensation payable
D under Regulation 261/2004 meant that it was not subject to the ouster clause of art. 29 of the Montreal Convention. In the present cases before this court, none of the claims for damages could be argued to be akin to the compensation payable under Regulation 261/2004. The plaintiffs here are in fact seeking redress on an individual basis, and in some cases, purporting to
E do so outside the limits set out in the Warsaw and Montreal Conventions.

[66] This very point was considered by the UK Supreme Court in *Stott* (*op. cit.*), where *Nelson v. Deutsche Lufthansa* was also cited in argument. The court distinguished *Nelson v. Deutsche Lufthansa* on the following basis:

F

58. The European case law does not assist Mr Stott. The question in the cases about Regulation (EC) 261/2004 was whether the scheme of standardised remedial measures was compatible with the Montreal Convention. The court recognised that any claim for damages on an individual basis would be subject to the limits of the Convention (IATA para 42). Mr Stott's claim is for damages on an individual basis.

G

[67] In my judgment, the cases cited in argument by counsel of some of the plaintiffs, including *IATA v. Dept of Transport*[17], *Sturgeon v. Condor Flugdienst*[18], *Nelson v. Deutsche Lufthansa*, *Cuadrench Moré v. Koninklijke Luchtvaart Maatschappij*[19], *Dawson v. Thomson Airways*[20] and *Gahan v. Emirates*[21], can all be distinguished because they dealt with the particular
H nature of Regulation 261/2004, which provides a standardised measure of compensation to passengers for flight delays and cancellations. The plaintiffs in the cases before me seek individual redress, and like Mr Stott, are only permitted to do so within the ambit of the Warsaw and Montreal Conventions (as applicable).

I

Does Section 7 Of The Civil Law Act Apply To Convention Claims?

[68] I now turn to the second question of law to be addressed, relating to the scope and applicability of s. 7 of the Civil law Act 1956. Counsel for MAS framed the following questions pursuant to the directions of the court:

(a) Whether s. 5 of the Carriage by Air Act 1974 read together with Third Schedule thereof operates to exclusively regulate the liability regime and/or the cause of action in relation to fatal aviation accidents in relation to the death of a passenger under art. 17 of the Montreal Convention;

(b) Whether recoverable damages as a result of any liability found under art. 17 of the Montreal Convention would be governed by s. 7 of the Civil Law Act 1956 being the operative domestic law in Malaysia regulating recoverable damages and assessment thereof for fatal accidents.

[69] These questions were important because s. 7(3) of the Civil Law Act 1956 prescribes the applicable measure of damages claimable in a dependency claim, and in certain cases imposes limits on such damages. In my view, it was desirable to ascertain prior to trial if s. 7(3) applies to claims in Malaysia under the Montreal Convention, as the answer to this question will affect the nature and scope of the evidence that is to be tendered in order to prove loss of earnings of the victims.

[70] It was advanced by counsel for some of the plaintiffs that s. 5 of the Carriage by Air Act 1974 excludes the application of s. 7(3) of the Civil Law Act 1956 for the purposes of ascertaining the quantum of damages claimable and relied on the Canadian case of *Frederick v. Ottawa Aero Services*[22] for the proposition that the measure of damages payable ought to be ascertained by reference to the Civil Law Act 1956 prior to the introduction of the proviso to s. 7(3) in 1984.

[71] The Carriage by Air Act 1974 was enacted to give effect to the Warsaw Convention, to which Malaysia became a signatory in 1970. It was amended to incorporate Montreal Convention in 2007. Section 5 of the Carriage by Air Act 1974 provides as follows:

> 5 Fatal Accidents
>
> Any liability imposed by Article 17 of the Convention, Article 17 of the Amended Convention or paragraph 1 of Article 17 of the Montreal Convention on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any written law or any rule of law in force in Malaysia relating to fatal accidents due to a wrongful act, neglect or default and the provisions set out in the Third Schedule shall have effect with respect to the person by and for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced.

[72] The Third Schedule provides, *inter alia*, for the identity of persons who are entitled to claim in the event of the death of a passenger. Significantly, the universe of potential claimants specified in the Third Schedule is broader than that under s. 7(2) of the Civil Law Act 1956. For example, grandparents, grandchildren and siblings are permitted to make dependency claims in the case of an international aviation accident.

[73] Section 5 thus substitutes for all liability for fatal international aviation accidents under any pre-existing Malaysian law due to a wrongful act, neglect or default with the liability imposed under art. 17(1). Mr Saranjit for MAS describes this as "cause of action substitution", a term which I gratefully adopt.

[74] It would be useful for the purposes of reference to reproduce again arts. 17(1) and 29 of the Montreal Convention:

> Article 17
>
> Death and Injury of Passengers – Damage to Baggage
>
> 1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
>
> …
>
> Article 29 – Basis of Claims
>
> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

[75] Article 29 makes it clear that the question as to who are the persons who have the right to bring suit and what are their respective rights is a matter for local law to determine. In addition, none of the Carriage by Air Act 1974, the Third Schedule to that Act or the Montreal Convention makes express mention of any applicable measure of damages (although as we shall see, a different view was arrived at by the Ontario High Court in *Frederick v. Ottawa Air Services*).

[76] The US Supreme Court in *Zicherman v. Korean Air Lines*[23] considered art. 24 of the Warsaw Convention (the predecessor to art. 29 of the Montreal Convention) and found that, as a matter of proper interpretation of the provisions of art. 24, the questions of who may bring a suit and what they may be compensated for is a matter to be determined by the applicable local laws.

[77] In September 1983, Korean Air Lines Flight KE007 flying from Anchorage to Seoul strayed into Soviet airspace, and was shot down by a Soviet SU-15 interceptor. All 269 on board the Boeing 747 perished, including Ms Muriel Kole. Ms Kole's mother and sister sued the airline, claiming for, among others, the loss of Ms Kole's society and companionship. It was advanced for Korean Air Lines that the Warsaw Convention did not permit claims for loss of society. In considering the scope of art. 24, Scalia J. held as follows:

> The other alternative, and the only one we think realistic, is to believe that "dommage" means (as it does in French legal usage) "legally cognisable harm," but that Article 17 leaves it to adjudicating courts to specify what harm is cognisable. That is not an unusual disposition. Even within our domestic law, many statutes that provide generally for "damages," or for reimbursement of "injury," leave it to the courts to decide what sorts of harms are compensable. See, e.g., *Miles v. Apex Marine Corp.*, 498 U. S. 19, 32 (1990) (Jones Act, 46 U. S. C. App. § 688 (1988 ed.), which provides "action for damages" to "[a]ny seaman who shall suffer personal injury," permits compensation only for pecuniary loss); *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 71 (1913) (Employers' Liability Act of Apr. 22, 1908, which makes employer "liable in damages ... for ... injury or death," permits compensation only for pecuniary loss); *Broan Mfg. v. Associated Distributors, Inc.*, 923 F.2d 1232, 1235-1236 (CA6 1991) (Lanham Trade-Mark Act, 15 U. S. C. § 1117(a), which provides for recovery of "any damages sustained," permits compensation for future lost profits); *Phelps v. White*, 645 So. 2d 698, 703 (La. Ct. App. 3d Cir. 1994) (specifying elements of compensation allowable under La. Civ. Code Ann. § 2315.2 (West Supp. 1995), providing for recovery of "damages ... sustained as a result" of wrongful death); *Department of Ed. v. Blevins*, 707 S. W. 2d 782, 783 (Ky. 1986) (Kentucky Rev. Stat. Ann. § 411.130 (Michie 1992), which provides that "damages may be recovered" for wrongful death, does not permit compensation for emotional distress).
>
> That this is the proper interpretation is confirmed by another provision of the Convention. Article 17 is expressly limited by Article 24, which as translated provides:
>
> "(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> "(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, **without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights**." 49 Stat. 3020 (emphasis added).
>
> The most natural reading of this Article is that, in an action brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for. Those questions are to be answered by the domestic law selected by the courts of the contracting states. Petitioners contend that, because Article 24 refers to the parties' "respective rights," this provision defers to

A domestic law only on the "procedural" issues of who has standing to sue and how the proceeds of a damages award under Article 17 should be divided among eligible claimants. It does not seem to us that the question of who is entitled to a damages award is procedural; and in any event limiting Article 24 to procedural issues would render it superfluous, since Article 28(2) provides that "[q]uestions of procedure shall be governed by
B the law of the court to which the case is submitted." 49 Stat. 3021. More importantly, petitioners' reading of Article 24(2) would produce a strange regime in which 1929 French law (embodied in the Convention) determines what harms arising out of international air accidents must be indemnified, while current domestic law determines who is entitled to the indemnity and how it is to be divided among claimants. When presented
C with an equally plausible reading of Article 24 that leads to a more comprehensible result-that the Convention left to domestic law the questions of who may recover and what compensatory damages are available to them-we decline to embrace a reading that would produce the melange of French and domestic law proposed by petitioners.

D Because a treaty ratified by the United States is not only the law of this land, see U. S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties. Both of these sources confirm that the compensable injury is to be determined by
E domestic law. In the drafting history, the only statements we know of that directly discuss the point were made by the Comité International Technique d'Experts Juridiques Aériens (CITEJA), which did the preparatory work for the two Conferences (1925 in Paris, 1929 in Warsaw) that produced the Warsaw Convention. In its report of May 15, 1928, the
F Committee stated:

> It was asked whether it would not be possible, in this respect, to determine the category of damages subject to reparations.
>
> Although this question seemed very interesting, it was not possible to find a satisfactory solution before knowing exactly the
G legislation of the various countries. It was understood that the question would be studied later on, when the issue of knowing which are the persons, who according to the various national laws, have the right to take action against the carrier, will have been elucidated." Report of the Third Session of CITEJA by Henry de Vos, reprinted in International Technical Committee of Legal
H Experts on Air Questions 106 (May 1928).

To the same effect is the following passage from the CITEJA Report accompanying the 1929 draft:

> The question was asked of knowing if one could determine who the persons upon whom the action devolves in the case of death
I are, and what are the damages subject to reparation. It was not possible to find a satisfactory solution to this double problem, and the CITEJA esteemed that this question of private international law should be regulated independently [*sic*] from the present

> Convention." Report of the Third Session of CITEJA by Henry de Vos (Sept. 25, 1928), reprinted in Second International Conference on Private Aeronautical Law Minutes, Warsaw 1929, p. 255 (R. Horner & D. Legrez transl. 1975).
>
> Both these statements make clear that the questions of who may recover, and what compensatory damages they may receive, were regarded as intertwined; and that both were unresolved by the Convention and left to "private international law" - ie, to the area of jurisprudence we call "conflict of laws," dealing with the application of varying domestic laws to disputes that have an interstate or international component.

[78] Although the Supreme Court rejected the contention by the defendant that the Warsaw Convention applied to preclude loss of society claims (because the issue is one that must be determined by reference to local laws), the court held that such claims were nonetheless not claimable under US domestic laws.

[79] The phrase "without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights" appear in near identical form[24] in both art. 24(1) of the Warsaw Convention and in art. 29 of the Montreal Convention. I am accordingly of the view that the same principles apply under the Montreal Convention, which is that the identity of potential claimants and the appropriate measure of damages are matters to be determined by reference to Malaysian domestic laws.

[80] The follow-on question is therefore what are the applicable Malaysian domestic laws? Mr Nethi for the plaintiffs in suit WA-21NCVC-20-03/2016 advanced two interrelated propositions:

(a) the first is that s. 5 of the Carriage by Air Act 1974 displaces the whole of s. 7 of the Civil Law Act 1956; and

(b) the second is that, based on the authority of the Canadian High Court case of *Frederick v. Ottawa Aero Services*[25], s. 7(3) of the Civil Law Act 1956 applies but without regard to the limitations, exceptions and qualifications introduced by the proviso to that subsection.

[81] I deal with these arguments in turn.

[82] In my judgment, s. 5 of the Carriage by Air Act 1974 does not displace the whole of s. 7 of the Civil Law Act 1956, but merely operates to substitute the applicable causes of action. Thus the liability for any "wrongful act, neglect or default" as used in s. 7(1) of the Civil Law Act 1956 would be taken as having been substituted with the no-fault liability of a carrier introduced by art. 17(1) in cases of fatal international aviation accidents.

[83] This is the only possible and reasonable construction of the effect of s. 5, because at common law, no remedy exists for death caused to a person. It is only with the introduction of s. 7 of the Civil Law Act 1956 that it became possible for a dependency claim to be made for wrongful death

caused by a tortfeasor. The Montreal Convention (and the Warsaw Convention before it) extends this such that no fault of the carrier need be proven in international aviation accident claims.

[84] In *Sambu Pernas Construction v. Pitchakkaran*[26], Salleh Abas FJ, speaking for the Federal Court, explained the genesis of dependency claims:

> At common law the death of a person gives rise to two principles. The first is that the death of any person is not a civil wrong. Therefore no action can be founded on it although death may result in pecuniary losses or damages to the deceased's spouse and children. Lord Ellenborough C.J. in *Baker v. Bolton* (1808) 1 Camp 493 ruled that "in a civil court the death of a human being could not be complained of as an injury." The second principle was that when a person died any cause of action which was vested either in his favour or against him at the time of death was buried with him. In other words the cause of action did not survive the death: "*actio personalis moritur cum persona*". The first principle which regarded death as not giving rise to any cause of action was rectified by section 1 of the Fatal Accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act whilst the second principle which dealt with the non-survival of the cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act, 1934. The provisions of these two UK statutes are now incorporated in sections 7 and 8 of our Civil Law Act, 1956.
>
> Had it not been for sections 7 and 8 of the Civil Law Act it is clear that the respondent could not have the right to bring the suit, and having acted under these sections and in particular section 7, his case must stand and fall on the basis of these sections.

[85] Thus, if the whole of s. 7 is excluded by the operation of s. 5 of the Carriage by Air Act 1974, it would follow that there would not exist any ability to claim for the death of a person, and hence no means by which damages may be calculated, for damages are not even claimable at common law.

[86] As I have stated, the only possible and reasonable construction of s. 5 of the Carriage by Air Act 1974 is that it provides for cause of action substitution. Section 7(1) of the Civil Law Act must thus be read to refer to the no-fault liability of a carrier under art. 17(1) of the Montreal Convention. Section 7(2), which provides for the identity of potential claimants in a dependency claim, is modified or substituted by provisions of para. 1 of the Third Schedule to the Carriage by Air Act 1974, which as explained earlier, extends the categories of potential claimants. This interpretation is also justifiable based on the principle of construction that the more specific provisions of law dealing with international aviation accidents would prevail over the position at general law relating to dependency claims. Finally, because none of the Carriage by Air Act 1974, the Third Schedule or the Montreal Convention makes express mention of any applicable measure of

damages, I am of the view that s. 7(3) would apply to determine what the rights of a plaintiff may be in a claim in Malaysia under the Montreal Convention.

[87] I now turn to the second point raised by Mr Nethi, which was that the measure of damages payable ought to be ascertained by reference to the Civil Law Act 1956 prior to the introduction of the proviso to s. 7(3) in 1984. He found support for this proposition in the Ontario High Court case of *Frederick v. Ottawa Aero Services*[27].

[88] The deceased in this case was a professor and scientist teaching at a college in Massachusetts. On a winter's night in 1962, the twin-engine Piper Apache aircraft that he was travelling in crashed into the snow-covered top of Mount Kearsarge in New Hampshire, killing Professor Frederick. A suit was brought against the defendant for the benefit of his widow and their three children, aged six, nine and twelve.

[89] The Ontario High Court held that:

(a) section 2(4) of the Canadian Carriage by Air Act (the provisions of which are for all intents and purposes in *pari materia* with our s. 5) displaced the Fatal Accidents Act (their equivalent of Lord Campbell's Act and our s. 7 of the Civil Law Act 1956). I have explained at paras. 82 to 86 *ante* why I cannot agree with this proposition;

(b) the defendant was liable for damage sustained with no exceptions, additions or qualifications. This was because the Carriage by Air Act enacted the Warsaw Convention as Canadian law, art. 17 of which provided that a carrier is liable for "damage sustained", without the qualifications contained in the Fatal Accidents Act. The learned judge held:

> In my opinion the words in the Carriage by Air Act "for damages sustained" with no qualifications, as there are in the Fatal Accidents Act, mean that the assessment of damages must be on the basis of the principles enunciated in cases before the amendments were made to the Fatal Accidents Act and that all matters must be taken into consideration in determining the actual damage, *i.e.*, the loss of pecuniary benefit, as referred to in the *Pym* case, *supra*.

[90] I am unable to agree with this decision for the following reasons:

(a) firstly, the words "for damage sustained"[28] do not fix the applicable measure of damages. To read this into art. 17 would be contrary to the express provisions of art. 24, which provided that the conditions and limits in the Convention do not affect the question "as to who are the persons who have the right to bring suit and what are their respective rights". This second part of the phrase was interpreted to refer to what

claimants may be compensated for, in the later US Supreme Court decision of *Zicherman v. Korean Air Lines*. This Ontario High Court decision is thus also inconsistent with *Zicherman v. Korean Air Lines*; and

(b) secondly and no less significantly, the court in *Frederick v. Ottawa Aero Services* did not explain how it was possible for the Fatal Accidents Act to have been displaced by s. 2(4) of the Carriage by Air Act but yet continue to apply without taking into account the subsequent amendments to that Act.

[91] For the reasons explained above, I am of the view that:

(a) section 5 of the Carriage by Air Act 1974 provides for cause of action substitution only in relation to fatal international aviation accidents, and does not preclude the operation of the entire of s. 7 of the Civil Law Act 1956; and

(b) section 7(3) of the Civil Law Act 1956 governs recoverability and assessment of damages consequent upon any liability found under art. 17 of the Montreal Convention.

Endnotes:

1. Special drawing rights, which is best understood as a notional currency the value of which is determined by reference to a basket of currencies
2. [1997] 1 LNS 227, [1998] 1 AMR 126, [1998] 1 MLJ 240, [1997] 5 MLRH 152
3. [2003] 4 CLJ 337, [2003] 5 AMR 696, [2004] 1 MLJ 8, [2003] 1 MLRA 582
4. See footnote 6, *post*
5. See footnote 13, *post*
6. [1997] AC 431
7. The provisions of the Warsaw Convention under consideration by the House of Lords at that material time did not incorporate the amendments made by Protocol No 4 of Montreal, 1975
8. See p. 441 of the report, at para. D
9. [2008] 3 HKC 26
10. 119 S. Ct 662 (1999)
11. See para. 14 of the judgment of Ginsburg J, at p. 675 of the report.
12. [2015] 4 LRC 324
13. [2014] UKSC 15
14. [2013] 1 All ER (Comm) 385
15. [2012] 9 CLJ 429; [2013] 4 AMR 404, [2013] 4 MLJ 744
16. *op. cit*. footnote 14

17. ECJ judgment of 10 January 2006, case C-344/04
18. [2010] All ER (EC) 660
19. [2013] 2 All ER (Comm) 1152
20. [2014] EWCA Civ 845
21. [2017] EWCA Civ 1530
22. (1963) 42 DLR (2d) 122
23. 516 U.S. 217 (1996)
24. The singular "question" is used in art. 29 of the Montreal Convention, whereas the more grammatically accurate "questions" was used in art. 24(2) the Warsaw Convention prior to its amendment by Protocol No 4 of Montreal 1975.
25. *op. cit.*, footnote 22
26. [1982] CLJ 151, [1982] 1 MLJ 269, [1982] 1 MLRA 143
27. *op. cit.*, footnote 22
28. Which in fact appear in art. 17 of the Warsaw Convention and not in the Carriage by Air Act as stated by the learned judge in that case